UNITED STATES DEPARTMENT OF LABOR
BOARD OF ALIEN LABOR CERTIFICATION APPEALS
800 K STREET, N.W.
WASHINGTON, D.C. 20001

DATE: JANUARY 20, 1998

CASE NO.: 96-INA-485

In the Matter of:

2 SA 2 INTERNATIONAL TRADING CO.,
Employer,

on behalf of

SVETLANA CHTCHELKOUNOVA,
Alien

Appearance: Alex Berlin, Esq.

Before: Huddleston, Lawson and Neusner
Administrative Law Judges

JAMES W. LAWSON
Administrative Law Judge

DECISION AND ORDER

This case arises from 2 SA 2 International Trading Company's ("Employer") request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for alien labor certification on behalf of Svetlana Chtchelkounova ("Alien").[1]

This decision is based on the record upon which the CO denied certification and Employer's request for review, as contained in the Appeal File ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

[1] The certification of aliens for permanent employment is governed by §212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20 Part 656 of the Code of Federal Regulations. Unless otherwise noted, all regulations cited to in this decision are in Title 20.

On February 28, 1994, the Employer, 2 SA 2 International Trading Co., filed an application for labor certification to enable the Alien, Svetlana Chtchelkounova, to fill the position of "Marketing and Business Consultant." (AF 229). A Bachelor of Arts degree in economics or marketing was required, as was fluency in Russian and English and four years of experience in the job offered.

In a Notice of Findings ("NOF") dated December 14, 1995, the CO advised Employer that it appeared to be a non-existent business or to be listing a non-existent job opening. While in a letter dated February 17, 1994, Employer had stated that its business was established in 1992, and that it had four workers, Employment Development Department (EDD) tax records failed to show any employee wages or contributions by Employer. While Employer asserted that its gross income in 1993 was over $500,000.00, insufficient documentation had been provided to show that the business had the capacity to hire a full-time permanent employee. The CO found Employer's proof of one transaction insufficient to support a finding of the ability to hire a worker on a full-time basis.

The CO stated that the telephone book showed no business listing at Employer's address as listed on the ETA 750, and that Employer's business was not listed in the telephone directory. Employer was requested to submit rebuttal that an on-going business with a location in the United States existed, which entity had an existing full-time position. Employer was also requested to document that it had the capacity to hire a full-time permanent employee, including copies of the firm's business license, State and Federal income tax returns and any business plan that showed how the business was expanding. Documentation regarding business travel, since same was listed in the job description, was also required.

The CO further determined that the position was one which did not normally require a foreign language. Employer was required to document that the foreign language requirement was justified by a business necessity, document that it was a customary requirement for the occupation or delete the requirement and re-advertise.

The CO questioned Employer's documentation to date, consisting of partial telephone bills showing calls to Russia and CIS, which bills did not match Employer's business telephone number. The account holder's name and address were not included with the bills, and the telephone calls did not appear to be made, for the most part, during the work week.

The CO found the job requirement of a Bachelor's degree in economics or marketing and four years of experience to be restrictive, as the requirement exceeded the applicable Specific Vocational Preparation (SVP) level. The CO stated that the Dictionary of Occupational Titles (DOT) occupation of Market Research Analyst was the closest fit to the Employer's job description. That position required a maximum combination of four years of education, training, and experience. Employer was advised to reduce the combined experience requirements, justify the restrictive requirement as a business necessity or document that the requirement is a common one for the occupation in the United States.

Employer filed a rebuttal on January 15, 1996. (AF 96). Therein, Employer submitted numerous documents, including (1) a copy of the business license for the firm; (2) a Federal Schedule C Income Tax Return; (3) documentation of travel and work schedule; (4) documentation for business and marketing consulting services Employer has done in the past; (5) copies of surveys, analysis and solutions to client needs; and (6) telephone bills. Employer indicated its willingness to delete the consultant classification and amend the experience requirement.

The CO found the rebuttal unpersuasive and issued a Final Determination ("FD") on February 5, 1996. (AF 90). Therein, the CO stated that the question remained whether the Employer was capable of supporting a full-time position. While Employer had indicated it was including a business plan in its rebuttal, listed therein as Exhibit D, no such exhibit was provided. The CO pointed out that the net profit for the business was Employer's self-employment income. Thus, Employer had submitted a 1994 Schedule C, "Profit or Loss From Business," showing a net profit of $52,323.00. (AF 175). No employee wages or benefits were deducted as expenses, while travel expenses were listed as $12,308.00. The position at issue herein listed a monthly salary of $3,168 per month, or over $38,000.00 per year, and this amount did not include the travel costs for an employee, nor did it include unemployment insurance or benefits for the employee. When Employer traveled for business, he stayed with family, something an employee could not be expected to do.

The CO determined that the cost of the new position would most likely consume 73% of the business profit which is Employer's current income. Additionally, Employer also has a full-time secretary, another high cost to consider. Without a business plan to show how Employer would continue to profit, or have income with two full-time employees who will cost at least Employer's entire 1994 net profit, the documentation did not support a finding that Employer had the capability to fund a full-time position on a permanent basis.

Employer's documentation also did not support a finding that there was a current full-time job opportunity available. Employer had failed to establish a work schedule for a full-time market research analyst. The documentation submitted by Employer, consisting of one week of appointments in marketing and a list of companies with which Employer had worked, with no explanation of how time was spent in the market research job duties, was insufficient.

On March 5, 1996, Employer submitted a request for review. (AF 89). On October 18, 1996, Employer requested an extension of time in which to file a brief, which motion was granted. Employer was given until December 2, 1996 to file a brief, No brief was filed.

DISCUSSION

Employer has argued in its letter requesting review that he has an on-going business to run and as a new employer, he has the financial capability to support a full-time position.

Employer further contends that he based his ability to pay upon last year's earnings, and not his earnings in 1994, as relied upon by the Department of Labor (DOL). The fact that Employer did not have a business plan to show how the business will continue to profit, does not necessarily support a finding that he does not have the capability to fund a full-time position on a permanent basis. The failure to supply DOL with the required documentation does not necessarily support the argument that a current full-time position does not exist, and the failure to submit a work schedule for a full-time market research position does not necessarily support the argument that a full-time position does not exist. According to Employer, he would be able to put the Alien on the payroll on or before the date of the Alien's proposed entrance into the United States. DOL has not disproved his ability to put the alien on the payroll because DOL is requiring documentation that goes beyond the scope of its authority to deny based on not being able to pay the offered wage.

Employer argues that a job opening exists because he is working alone with the assistance of a secretary trying to run a company without any qualified assistance, and because Employer wants to "grow the company." Employer contends that his business has grown tremendously, and therefore, there is a need for an employee. Since Employer has no currently employed analyst to do the work and the work is being done by Employer, there are no documents to submit. This, however, does not mean that there is no job, "this only means that petitioner is doing the work and has chosen not to document the work on any formal paper other than what was submitted." While Employer does not have a current work schedule for himself or for the prospective employee, when that person is hired, Employer will assign work according to the needs at the time. Employer submitted additional and new documentation to support its ability to pay the offered wage to the prospective employee.

20 C.F.R. §656.20(c) requires that job offers filed on behalf of aliens must clearly show that the employer has enough funds available to pay the wage or salary offered the alien, and that the job opportunity has been and is clearly open to any qualified U.S. worker. The tax return submitted by Employer with its rebuttal shows that the only income was that listed on Schedule C, self-employment income in the amount of $52,323.00. This is clearly an insufficient amount to which to add the expense of an employee salary exceeding $38,000.00.

No other documentation was submitted to support a finding that there are sufficient funds available to pay the wage offered. Employer failed to submit documentation as requested by the CO, and that documentation which it has submitted does not establish an ability to pay the wages being offered, and in particular, the ability to pay the wages at the time of the signing of the ETA 750A by Employer. The CO made reasonable requests for information showing the ability to pay the wage offered as required by 20 C.F.R. §656.20(c)(1). Failure to comply with

the request constitutes a ground for denial of certification. The Whistlers, 90-INA-569 (Jan. 31, 1992).

When an employer fails to present reasonably requested documents and fails to adequately document that a current job opening exists and that the employer has sufficient funds

to pay the employee, certification is properly denied because no bona fide job opportunity has been shown. Aerial Topographical Maps, 94-INA-627 (Aug. 15, 1996). The instant case dictates the same result. Employer has failed to establish that he is a viable and successful business entity, able to pay the advertised wage. AZ Air Conditioning & Heating, Inc., 93-INA-554 (Mar. 31, 1995). Labor certification was properly denied. The remaining issues, therefore, need not be addressed.

ORDER

The Certifying Officer's denial of labor certification is hereby ***AFFIRMED***.

For the Panel:

James W. Lawson
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400 North
Washington, D.C. 20001-8002

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order

briefs.